Supreme Court, U. S.
FILED
SEP 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-2033

In the

Supreme Court of the United States

OCTOBER TERM 1979

CAROL C. WOODWARD, as Administrator of the Estate of CHARLES C. WOODWARD, Deceased, and CAROL C. WOODWARD, Individually,

Appellant,

vs.

BURNHAM CITY HOSPITAL, a corporation and GEORGE GREEN and STAN J. BOBOWSKI,

Appellees.

On Appeal from the Supreme Court of Illinois.

BRIEF OF ILLINOIS HOSPITAL ASSOCIATION AMICUS CURIAE

HARRY L. KINSER
McLAUGHLIN KINSER & BRYANT
135 S. LaSalle - Suite 1200
Chicago, Illinois 60603
782-8018
Counsel for Amicus Curiae

EDWARD J. McLAUGHLIN
KENNETH C. ROBBINS
McLAUGHLIN KINSER & BRYANT
135 S. LaSalle - Suite 1200
Chicago, Illinois 60603
Of Counsel

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

	PAGE
Statement of Interest	2
Argument	4
Conclusion	10
Appendix A	1a
Letter from Hurschal C. Tummelson stating no objection to Amicus Curiae brief	1a
Appendix B	2a
Letter from Leonard M. Ring stating no objection to Amicus Curiae brief	2a
Appendix C	3a
Letter from George S. Miller stating no objection to Amicus Curiae brief	3a
Appendix D	4a
Letter from Stephen M. O'Byrne stating no objection to Amicus Curiae brief	4a

CITATIONS

Cases

Mosby v. *Michael Reese Hospital* (1964) 49 Ill. App. 2d 336	4
Lipsey v. *Michael Reese Hospital,* (1970) 46 Ill. 2d 32	5
United States v. *Kubrick,* 100 Sup. Ct. 352, 357 (1979)	6
McGowan v. *Maryland,* 366 U.S. 420, 425-426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393 (1961)	8

PAGE

Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 1161, 25 L. Ed. 2d 491 (1970) 501-502 of 25 L. Ed. 2d 8

McDonald v. *Board of Election Commissions of Chicago,* 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969) 745, 746 of 22 L. Ed. 8

Wilson v. *Iseminger,* 185 U.S. 55, 62 (1902) 9

LAWS

Ill. Rev. Stat. 1976 Supp. ch. 83, Sec. 22.1 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-2033

CAROL C. WOODWARD, as Administrator of the Estate of CHARLES C. WOODWARD, Deceased, and CAROL C. WOODWARD, Individually,

Appellant,

vs.

BURNHAM CITY HOSPITAL, a corporation and GEORGE GREEN and STAN J. BOBOWSKI,

Appellees.

On Appeal from the Supreme Court of Illinois.

BRIEF OF ILLINOIS HOSPITAL ASSOCIATION AMICUS CURIAE

The Illinois Hospital Association submits herewith its brief in support of the position taken by the Appellees in this case who are filing Motions to Dismiss or Affirm as provided for in Rule 16 of the Rules of this Court.

Counsel for all parties to this cause have consented to the filing of this brief (Rule 42 of the Rules of this Court) and attached hereto as an Appendix are copies of such written consents.

The Illinois Hospital Association was an Amicus Curiae when this matter was before the Supreme Court of Illinois.

STATEMENT OF INTEREST

The Illinois Hospital Association is a statewide association of substantially all Illinois hospitals, having a membership of approximately 300.

The decision of the Supreme Court of Illinois from which Appellant's appeal is taken is to consider the constitutionality of Section 22.1 of the Illinois Limitations Act being Ill. Rev. Stats. 1976 Supp. ch. 83, par. 22.1 reading as follows:

> "No action for damages for injury or death against any physician or hospital duly licensed under the laws of this State whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death.
>
> If the person entitled to bring the action is, at the time the cause of action occurred, under the age of 18 years, or insane, or mentally ill, or imprisoned on criminal charges, the period of limitations does not begin to run until the disability is removed."

A decision of this court involving the constitutionality of the above statutory provision will have an important effect not only on the parties to this litigation but to all

the hospitals in Illinois. The case, therefore, transcends the interests of the parties hereto. If the four year limitation period is found to be unconstitutional, it will broaden considerably in medical malpractice cases the potential liability of all Illinois hospitals.

It is the position of the Amicus Curiae that Section 22.1 of the Illinois Limitations Act satisfies completely the requirements of Equal Protection and Due Process and it should be constitutionally sustained.

ARGUMENT

The decision of the Illinois Supreme Court finding that Section 22.1 of the Illinois Limitations Act satisfies constitutional requirements was correct and the statute is not violative of the Equal Protection and Due Process clause of the Fourteenth Amendment to the United States Constitution.

In this Court's consideration of the constitutionality of the challenged Illinois Limitations statute, it is important to notice the legislative history of the statutory provision.

This history is set out in detail in the opinion of the Illinois Supreme Court which is attached to plaintiff's jurisdiction statement (A8-A10). Prior to 1965, actions involving medical malpractice in Illinois were governed by the general provisions of the limitations act which was a two year limitation period. In 1964 in an Illinois Appellate Court opinion, the court had expressed dissatisfaction with the two year statute in a case involving the allegation that a surgical needle had been left in the body of the plaintiff-patient, that she did not discover until four years later when she had a second operation (*Mosby* v. *Michael Reese Hospital,* (1964) 49 Ill. App. 2d 336. At the next session of the Illinois General Assembly the legislature sought to alleviate the problem by providing in substance that where a foreign object has been introduced to a person's body and was negligently permitted to remain there, the period of time within which an action must be brought would not begin to run until the person knew or should have known of this fact, with an outside 10 year limitation following the

treatment or operation. It should be noted that other than cases involving foreign objects, the two year provision of the Limitations Act still applied. In 1970, in the case of *Lipsey* v. *Michael Reese Hospital,* (1970) 46 Ill. 2d 32, the Illinois Supreme Court applied the discovery rule to a medical malpractice case not involving a foreign object left in the patients body and held that the cause of action did not accrue until the injured person learned of the injury or should have learned of it. Thereafter, this so-called discovery rule played a significant role in the growing medical malpractice crisis and it came to be known as the "long tail of liability". The result was that insurance companies were increasingly reluctant to insure against medical malpractice liability. This result was not limited to the state of Illinois as the opinion of the Supreme Court of Illinois amply demonstrates. (App. 10 plaintiff's jurisdictional statement to and including App. 13). Throughout the country, legislatures were seeking to deal with this problem by permitting plaintiffs in medical malpractice cases more time than the usual two years to institute legal action but at the same time to set an outside limit for filing such lawsuits. Thus, in 1975, the Illinois General Assembly amended Section 21.1 of the Limitations Act by adding to its previous provisions concerning a foreign object a provision limiting the time within which other malpractice actions may be brought to two years. However, the statute further provided an outside time limit of 5 years for bringing this type of action in cases where the discovery rule was applicable.

In 1976 Section 21.1 was again amended deleting the special provisions concerning foreign objects left in the body and providing that all malpractice actions against

physicians and hospitals arising out of patient care shall not be brought more than two years after the claimant knew or should have known of the existence of the injury but in no event more than 4 years after the date on which occurred the last act or omission alleged to have been the cause of such injury.

The foregoing history illustrates that the Illinois Legislature was seeking to deal with the problem of the length of time that a plaintiff in a medical malpractice case should be given to file a suit where the "discovery" rule might be involved while at the same time, placing some reasonable limit on the length of time within which such actions must be filed. This Court, in the case of *United States* v. *Kubrick*, 100 Sup. Ct. 352 (1979) pointed out the importance of statutes of limitations and the necessity that they be given effect by the courts in saying as follows at page 357 of 100 S. Ct.:

> "Statutes of limitation, which "are founded and approved in all systems of enlightened jurisprudence," *Wood* v. *Carpenter*, 101 U.S. 135, 139, 25 L. Ed. 807 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free from stale claims in time comes to prevail over the right to prosecute them." *Order of Railway Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349, 64 S. Ct. 582, 586, 88 L. Ed. 788 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to represent their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of wit-

nesses, fading memories, disappearance of documents, or otherwise."

Citing cases

"Section 2401(b), the limitations provision involved here, is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims. *Campbell* v. *Haverhill,* 155 U.S. 610, 617, 39 L. Ed. 280 (1895); *Bell* v. *Morrison,* supra, at 360. We should regard the plea of limitations as a "meritorious defense, in itself serving a public interest." *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 136, 58 S. Ct. 785, 790, 82 L. Ed. 1224 (1938)".

There can be no doubt that there was in Illinois, as there was in other states, a medical malpractice crisis and the opinion of the Illinois Supreme Court amply establishes that fact.

The appellant's principle contention in arguing that the Supreme Court of Illinois violated the equal protection and due process clauses lies in the fact that the 4 year statute applies to physicians and hospitals and not others in the health care field. This is an instance wherein the Illinois legislature was seeking to deal with the problem at its most serious point of impact. At p. A20-A21 of the Appendix to plaintiff's jurisdictional statement, the Supreme Court of Illinois documents that medical malpractice claims made against physicians and hospitals in 1977 together accounted for 95% of the total number of medical malpractice claims and 98% of the dollar amounts of those claims paid.

This Court has frequently held that state legislatures have wide authority in enacting legislation to meet par-

ticular problems that will not be found to violate equal protection or due process if a reasonable ground can be found to sustain them.

In *McGowan* v. *Maryland,* 366 U.S. 420, 425-426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d. 393 (1961) this court said at pages 425-426, 366 U.S. as follows:

> "The constitutional safeguard of (equal protection) is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their law results in some inequality. A statutory discrimination will not be set aside if any statement of facts may be reasonably conceived to justify it."

Again in *Dandridge* v. *Williams,* 397 U.S. 471, 90 S. Ct. 1153, 1161, 25 L. Ed. 2d. 491 (1970) this court stated at pages 501-502 of 25 L. Ed. 2d as follows:

> "If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality' " (quoting *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78, 31 S. Ct. 337, 55 L. Ed. 369 at 377 (1911)

In *McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969) this court said at pages 745, 746 of 22 L. Ed.:

> "Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions

drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."

Citing cases.

"With this much discretion, a legislature traditionally has been allowed to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489, 99 L. Ed. 563, 573, 75 S. Ct. 461 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See *Ozan Lumber Co.* v. *Union County National Bank*, 207 U.S. 251, 52 L. Ed. 195, 28 S. Ct. 89 (1907)."

With specific reference to the due process question, the Plaintiff in the jurisdictional statement at p. 13 cites *Wilson* v. *Iseminger*, 185 U.S. 55, 62 (1902). It should be noted that following the quote used by the plaintiff ending with the words "it is essential that such statutes allow a reasonable time" this court made the following statement. At 63 of 185 U.S.:

"Though what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decisions in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice."

CONCLUSION

The amicus curiae respectfully submits that the appellees should prevail in this court's consideration of the issues raised since the Illinois Supreme Court in its opinion amply demonstrated the considerable problems faced by the Illinois legislature in meeting the question of how to make a fair provision for plaintiffs in medical malpractice cases in those instances in which a plaintiff was not immediately aware that malpractice may have been committed but at the same time providing a cut off date beyond which such actions could not be filed. Limiting the four year period to physicians and hospitals was simply a recognition by the Illinois legislature that it was physicians and hospitals against whom the overwhelming number of medical malpractice cases are filed. Based on this court's decisions, the Illinois legislature had a constitutionally permissible right to seek to meet the problem at its most serious point of impact and was not required to enact a statute to cover every conceivable cause of action.

The decision of the Illinois Supreme Court should be affirmed or plaintiff's jurisdictional statement should be dismissed.

Respectfully submitted,

HARRY L. KINSER
McLAUGHLIN KINSER & BRYANT
135 S. LaSalle - Suite 1200
Chicago, Illinois 60603
782-8012
Counsel for Amicus Curiae

EDWARD J. McLAUGHLIN
KENNETH C. ROBBINS
McLAUGHLIN KINSER & BRYANT
135 S. LaSalle - Suite 1200
Chicago, Illinois 60603
Of Counsel

APPENDIX

PHEBUS, TUMMELSON, BRYAN & KNOX
Law Offices
136 West Main Street
P.O. Box 100
Urbana, Illinois 61801
(217) 367-1144

July 2, 1980

Mr. Harry L. Kinser
McLaughlin, Kinser & Bryant
135 S. LaSalle St.
Chicago, IL 60603

Re: Woodward, etc vs. George Green, Burnham City Hospital, et al No. 79-2033

Dear Mr. Kinser:

We have your letter of July 1, 1980. We represent the defendant, George Green. We have no objections to your appearing amicus curiae and filing a brief in that capacity. We consent to that.

Yours truly,

/s/ Hurshal C. Tummelson
Hurshal C. Tummelson

HCT:as

Law Offices
LEONARD M. RING
And Associates

July 22, 1980

Mr. Harry L. Kinser
McLaughlin, Kinser & Bryant
135 South LaSalle Street
Chicago, Illinois 60603

Re: Woodward vs. Burnham City Hospital
U.S. Supreme Court No. 79-2033

Dear Mr. Kinser:

I have been able to get permission for you to file an *amicus* brief in the above. If you still desire to do so, you may consider this communication as an authorization on the part of the plaintiff.

Very truly yours,

/s/ Leonard M. Ring
Leonard M. Ring

LMR:ar

THOMAS, MAMER, HAUGHEY & MILLER
Lawyers
Fifth Floor, First National Bank Building
Post Office Box 967
Champaign, Illinois 61820

July 9, 1980

Mr. Harry L. Kinser
General Counsel
Illinois Hospital Association
McLaughlin, Kinser & Bryant
135 South LaSalle Street
Chicago, Illinois 60603

Re: Carol C. Woodward, as Administrator of the Estate of Charles C. Woodward, deceased, and Carol C. Woodward, individually vs. Burnham City Hospital, a corporation, and George Green and Stan J. Bobowski in the U.S. Supreme Court No. 79-2033

Dear Mr. Kinser:

You have our consent to file a Brief in subject matter as amicus curiae. We welcome your support.

Very truly yours,

/s/ George S. Miller
George S. Miller

GSM:pac

RENO, O'BYRNE & KEPLEY
Attorneys at Law
501 West Church Street
P. O. Box 693
Champaign, Illinois
61820

July 17, 1980

Mr. Harry L. Kinser
General Counsel
Illinois Hospital Association
McLaughlin, Kinser & Bryant
134 S. LaSalle St.
Chicago, IL 60603

Re: Carol C. Woodward, etc. v. Burnham City Hospital *et al.* In the U. S. Supreme Court — No. 79-2033

Dear Mr. Kinser:

In response to your letter of July 1, 1980, please be advised that Burnham City Hospital has no objection to your filing an *amicus* brief in the above-referenced cause of action, and in fact welcomes the continued interest of the Illinois Hospital Association. Further, we would support any motion on your part to file such a brief in the face of Mr. Ring's recent objection to your participation. As I hope to have advised you by telephone today, I do not believe that the Hospital will be filing a response or motion at this time to the plaintiff's jurisdictional statement. It is my understanding, however, that counsel for Dr. Green will be filing a motion to dismiss, or in the alternative, affirm, with a supporting brief.

Very truly yours,

Stephen M. O'Byrne
/s/ Stephen M. O'Byrne

SMOB:cb